***United States Court of Appeals***

***for the Second Circuit***

# PETITION FOR REHEARING EN BANC

76-2100

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ORIGINAL

B/PS

GUSTAVE ZURAK, WILLIAM McAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellees,

-against-

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Defendants-Appellants.

76-2100

PETITION FOR REHEARING
AND SUGGESTION FOR
REHEARING IN BANC



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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GUSTAVE ZURAK, et al., :

Plaintiffs-Appellees, :

-against- : 76-2100

PAUL J. REGAN, et al., :

Defendants-Appellants. :

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PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING IN BANC

Gustave Zurak, William McAuliffe, Salvatore Zambuto, Willie Mack, Benjanim Santiago and Martin Halpern, on behalf of themselves and all others similarly situated, plaintiffs-appellees herein, respectfully petition this Court (Lumbard and Van Graafeiland, JJ., and Bonsal, D.J.) for a rehearing, pursuant to Rule 40(a) of the Federal Rules of Appellate Procedure, of its decision rendered and entered on February 7, 1977 (attached as Appendix A). In the alternative, plaintiffs-appellees herein suggest, pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, that a rehearing in banc would be appropriate.

Appellees brought a 42 U.S.C. §1983 class action in the United States District Court for the Southern District of New York, alleging that their rights to due process and equal protection of the laws were violated by the procedures followed by New York Parole Board officials in considering their applications for conditional release from institu-

tions where they were serving definite sentences.* After an evidentiary hearing, the District Court (Carter, J.) held, inter alia:

> Fundamental fairness cannot be achieved under present procedures for processing conditional release applications unless the inmate-applicant is given the opportunity to appear in person before the Board and to discuss his case with the Commissioner.
>
> Dist. Ct. op. at p.14**

The District Court granted appellees' motion for a preliminary injunction ordering appellants, inter alia, to accord each applicant the opportunity for a personal hearing (slip op. at 1716-1717).***

This Court affirmed the injunction except as it required appellants to provide a personal hearing. The Court ruled that, because defendants in New York are given access to their presentence reports under New York Criminal Procedure Law §390.50 prior to sentencing and because appellees do not claim there is any motive for, or evidence of, fabrication in the parole officers' relation of inmate interviews to the Board, "the risk of the Board basing its decision on erroneous information is relatively minimal and the record simply does not support allegations that misinformed decisions have been prevelant in the past" (slip op. at 1730).

Appellees respectfully urge that this Court's decision be reconsidered because the following matters of fact and law were overlooked

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* Conditional releasees, upon the granting of their applications, are under the supervision of the New York State Board of Parole for one year from the date of their release. They are subject to the same supervisory conditions as New York parolees serving indeterminate sentences. See Court of Appeals opinion of February 7, 1977, at 17-17-1718, ftn. 1.&2.; 7 N.Y.C.R.R. §1915 et seq..

**"Dist. Ct. op." denotes the District Court's unreported decision of July 30, 1976, which is attached as appendix B.

***"Slip op." denotes the Court of Appeals decision of February 7, 1977. The content of the injunction is set forth in slip op. at 1716-1717.

or misapprehended:

I. The District Court found that the procedure followed by the Board in its consideration of conditional release applications posed a high degree of risk that release decisions would be based on erroneous information. Because that finding was not clearly erroneous, the finding should have been upheld on appeal. The record fully supported the conclusion that the risk of erroneous decisions was high and that misinformed decisions have been prevalent in the past.

II. Should the Court believe the record to be incomplete on the question of how prevalent are inaccuracies in inmate conditional release files, it should remand to the District Court the issue of the personal hearing for a full evidentiary hearing on the question of whether misinformed decisions are likely or have been prevalent in the past.

In the alternative, appellees respectfully suggest that the question whether due process requires that conditional release applicants be afforded a personal hearing before the decision-maker is appropriate for a rehearing in banc because:

III. The question is of exceptional importance because the right to appear and argue one's case before the decision-maker has been held fundamental.

## POINT I

### THE DISTRICT COURT'S FINDING THAT ERRORS WERE PREVALENT IN THE INMATE CONDITIONAL RELEASE FILES BEFORE THE COURT WAS NOT CLEARLY ERRONEOUS.

This Court incorrectly concluded that the risk of decisions based on erroneous information is "relatively minimal" and that the record "simply does not support allegations that misinformed decisions have

been prevalent in the past." (slip op. at 1730.) The statement is contrary to the factual findings of the District Court and to the record.

The District Court found that the failure to provide a personal hearing had resulted in decisions based on erroneous information:

> The testimony adduced at the hearing demonstrated unequivocally that the conditional release applicant is not receiving fair treatment under present procedures. He is interviewed by a parole officer, but because of staff constraints, the parole officer conducts no independent investigation, instead relying on what the inmate tells him and what information is in the file. He makes a report which is submitted to the Parole Board; yet the parole officer is never consulted by the Commissioner and, indeed, since he does not know the inmate-applicant, the Commissioner could not seem to be helped by the parole officer's presence. The inmates are not given access to their conditional release files.... The lack of such access seems to have led to injustice involving one of the named plaintiffs who had another inmate's records included in his file. The Parole Commissioner is too burdened to be expected on his own to notice such errors (and apparently in this case he did not). The parole officer assumes no responsibility for presenting the inmate's case. ...[T]he parole officer's report is neutral and everything is left pretty much up to the Commissioner. Fundamental fairness cannot be achieved under present procedures for processing conditional release applications unless the inmate-applicant is given the opportunity to appear in person before the Board and to discuss his case with the Commissioner.
>
> (Dist. Ct. op. at 13-14.)
> [emphasis supplied]

The factual inferences of the District Court should be upheld unless they are "clearly erroneous."* United States v. United States Gypsum Co., 333 U.S. 364, 394 (1948).

The record clearly supported the District Court's conclusion. The record of an inmate having a long history of mental illness and convic-

* The basic facts from which the District Court drew the inferences, i.e., the procedures used in considering applications, were undisputed.

tions for sex crimes, was mistakenly substituted for that of appellee Zurak. (Dist. Ct.op. at 14.) A pre-sentence report was not included. The files of appellees Zambuto and Mack, also lacking essential reports,* contained erroneous and prejudicial allegations made by the parole officers who compiled the data sheets. Although appellee Zambuto was convicted of attempted possession of a weapon, the data sheet report prepared by the interviewing parole officer stated that he had been "found guilty of Criminal Usury." Appellee Mack's parole officer, while averring in his data sheet summary that Mack was involved in prostitution and "was either involved in or on the periphery of illegal drug activities as well as other illegal activities" failed to set forth any substantiation for his conclusions.

Half of the files introduced below contained erroneous information or prejudicial comments by the interviewing parole officer lacking an evidentiary basis.** Psychiatric and medical reports were absent from all the files. Furthermore, as the District Court noted, errors were unlikely to be noticed or corrected. (Dist. Ct. op. at 14.) Thus, this Court's conclusion that the risk of misinformed decision was minimal was in direct conflict with the District Court's finding, which itself

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* Appellee Zambuto's file lacked his fingerprint report, and appellee Mack's did not include his pre-sentence report. See plaintiff-appellees' exhibit "4".

**Of the other files, the interviewing parole officers had not yet completed their reports in two of the three files. Only one of the six files thus was complete and errorfree.

was supported by the record.*

## POINT II

IN THE ALTERNATIVE, SHOULD THE COURT FIND THE RECORD BELOW IS INCOMPLETE, THE MATTER SHOULD BE REMANDED FOR A FURTHER EVIDENTIARY HEARING.

The hearing held by the District Court did not entertain directly the questions of fact necessary to resolve the issue of the likelihood of misinformed decisions.** However, substantial evidence was introduced supporting appellees' allegations that error is likely. See infra, Point I at 3-5. Contrasting sharply with the Court's disposition of the instant appeal is that of the Court in Holup v. Gates, ____F.2d___(2d Cir. Oct. 20, 1976), slip op. at 5887-8, where the panel, observing that the Connecticut parole applicants had not established even one instance of parole file

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* This Court's conclusion that the provisions of Procedure Law §390.50 (CPL §390.50) allow an inmate to discover and correct errors in the pre-sentence report is in error. (Slip op. at 1730.) The report is available for examination only by a defendant's attorney - if he should so request - not the defendant himself unless he is appearing in court pro se. The Parole Board's own regulations maintain the confidentiality of the pre-sentence report; an inmate may not examine it. 7 N.Y.C.R.R. §5.30(d); see CPL §390.50.

Furthermore, the inference that inaccuracies would be noted and corrected in writing in the pre-sentence report provided the Parole Board is without merit, for most errors, if found, would ordinarily be corrected orally at the time of sentencing by the defendant's attorney.

** See letter of Judge Carter dated November 21, 1975, outlining the issues to be heard at the evidentiary hearing. A copy is appended as Appendix "C".

inaccuracy, nonetheless, remanded the case for an evidentiary hearing to make an adequate record. Id. at ____, slip op. at 5889.

Should this court find the record to be incomplete regarding whether the likelihood of misinformed decision is high, the matter should be remanded for an evidentiary hearing.

## POINT III

### A REHEARING IN BANC IS APPROPRIATE.

A personal hearing has been recognized as a fundamental requisite of due process. One is entitled to appear before the decision-maker or his delegate to argue one's case whether facing loss or reduction of welfare benefits, Goldberg v. Kelly, 397 U.S. 254, 267 (1970), loss of a few days of "good time" while incarcerated, Wolff v. McDonnell, 418 U.S. 539,(1974), or even a ten-day suspension from public school, Goss v. Lopez, 419 U.S. 565, 580-81 (1975). Here, the Court has denied appellees this opportunity, instead relying solely upon the required statement of reasons for release denial to inform an applicant whether the denial was based on inaccurate information or was otherwise improper.* No one sets forth the inmate's case for release to the Board (District Ct. op. at 14.). Yet, because of a denial, an inmate may remain incarcerated for almost

* As the evidence showed in the district court, a typical reasons statement might read "you have a long history of arrests and...your release at this time would be incompatible withe the interests of society," but "[the Parole Board doesn't] list what those arrests would be." (Record on appeal, appendix at 198a) Whether such a statement could provide an inmate with any meaningful information or alert him to errors in his file is unlikely.

two years.*

Due process requires that the opportunity to be heard be tailored to the capacities and circumstances of those directly affected by the decisions. Goldberg v. Kelly, supra at 268-9. Written submissions are not practical for prisoners. See Johnson v. Avery, 393 U.S. 483, 487 (1969). Indeed, it is not likely that they are even considered by the parole commissioner who spends but a few minutes with each file. (Record on appeal, appendix at 191a-192a.); see also Citizens' Inquiry on Parole and Criminal Justice, Inc., Prison Without Walls - Report on New York Parole 44 (Praeger, 1974).

The denial in this appeal of the right to be heard at "a meaningful time and in a meaningful manner", Armstrong v. Manzo, 380 U.S. 545, 552 (1965), raises a question of exceptional importance. A rehearing in banc is appropriate.

* This Court stated that "in the majority of cases" the consequences of an adverse decision were greater for the parole than the conditional release applicant (slip op. at 1726 n. 13). However, a parole applicant will be reconsidered for release within two years, and often earlier. See New York Correction Law §212(3). The conditional release applicant is considered only once, and if denied release is not again eligible for release.

## CONCLUSION

Appellees respectfully submit that as set forth above, this Court misapprehended and overlooked findings of fact and law and therefore a rehearing is necessary. In the alternative, appellees suggest that a rehearing *in banc* is appropriate.

WHEREFORE, petitioners-plaintiffs-appellees request that the petition be granted.

Respectfully submitted,

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Dated: New York, New York
February 22, 1977

# APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 425—September Term, 1976.

(Argued October 29, 1976 Decided February 7, 1977.)

Docket No. 76-2100

GUSTAVE ZURAK, WILLIAM MCAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

*Plaintiffs-Appellees,*

—v—

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

*Defendants-Appellants.*

Before:

LUMBARD and VAN GRAAFEILAND, *Circuit Judges,*
and BONSAL, *District Judge.**

Appeal from an injunction issued in the Southern District in which Judge Carter found that due process requires that defendants-appellants: (1) process applica-

* Of the Southern District of New York, sitting by designation.

tions for conditional release from the New York City Correctional Institution for Men, Rikers Island in order of eligibility and within 60-90 days of an inmate's arrival at Rikers Island; (2) provide written statements of reasons and facts to inmates whose applications for conditional release are denied or deferred; and (3) accord each applicant an opportunity for a personal appearance before a commissioner of the Board of Parole.

Affirmed except as it requires appellants to provide a personal appearance.

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GORDON J. JOHNSON, Esq., The Legal Aid Society, New York, N.Y. (Natalie J. Kaplan, William E. Hellerstein and Donald H. Zuckerman, Attorneys, The Legal Aid Society, New York, N.Y., on the brief), *for Appellees.*

ARLENE R. SILVERMAN, Assistant Attorney General, State of New York (Louis J. Lefkowitz, Attorney General of the State of New York and Samuel A. Hirshowitz, First Assistant Attorney General, State of New York, on the brief), *for Appellants.*

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LUMBARD, *Circuit Judge:*

Defendants-appellants, members of the New York State Board of Parole (hereinafter "the Board") and state correctional services officials, appeal from an injunction issued in the Southern District, dated July 30, 1976, upon findings by Judge Carter that due process requires that defendants: (1) institute procedures to ensure that applications for conditional release from the New York City Correctional Institution for Men, Rikers Island, are pro-

cessed in order of eligibility and within 60-90 days of the applicant's arrival at Rikers Island; (2) provide each inmate whose application for conditional release is denied or deferred a written statement of the reasons for the Board's action together with the facts relied upon in reaching the decision; and (3) accord to each applicant the opportunity for a personal appearance before the Board commissioner or commissioners responsible for determining the disposition of the application. Appellants contend that the inmates' interest in conditional release is not sufficient to make their claims cognizable under the Due Process Clause; further, they argue that in any event due process does not require the procedures ordered by the district court. We reverse so much of the district court's injunction which mandates an opportunity for personal appearance before a member of the Board and affirm the remainder.

Under New York Penal Law § 70.40(2)[1] individuals, such as were the appellees, serving one or more definite sentences of imprisonment with an aggregate term in excess

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1 Section 70.40(2) provides as follows:

2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board, in accordance with the provisions of the correction law.

Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance.

of 90 days may request conditional release from custody at any time after the service of 60 days; release is at the discretion of the Board and is probationary for one year. "Definite sentences" under New York law never exceed one year, New York Penal Law §§ 70.00(4), 70.15(1), although a person sentenced to two or more definite sentences may be required to serve an aggregate term of up to two years.[2] New York Penal Law § 70.30(2)(b). Definite sentences may be imposed for certain misdemeanors and certain low-grade felonies. See New York Penal Law §§ 70.15, 70.00(4). In contrast, sentences of more than one year are indeterminate and may be imposed only for crimes classified as felonies. New York law requires that the term of an indeterminate sentence be at least three years and provides that it may be for as long as life for certain crimes. See New York Penal Law § 70.00. An individual sentenced to an indeterminate term is eligible for parole after having served a minimum period of imprisonment (as fixed by the sentencing court, or, in certain cases, the Board), which much be at least one year and may be as long as 25 years. New York Penal Law § 70.00(3). Definite sentences are served in a county or regional correctional institution; indeterminate sentences must be served in a state prison. New York Penal Law § 70.20. Under New York Correctional Law § 214 applicants for parole, but not for conditional release, are entitled to a personal appearance before a three-member panel of the Board and a written statement of reasons and facts relied upon if parole is denied. Appellees argued before the district court that the lack of

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2 The term of a definite sentence is credited with any time spent in custody prior to the commencement of the sentence as a result of the charge that culminated in the sentence. The credit is referred to as "jail time." New York Penal Law § 70.30(3). In addition, the term of a definite sentence may be significantly shortened through the use of good time credits. See New York Penal Law § 70.30(4).

such procedures in the case of conditional release applications violates both due process and equal protection and sought declaratory and injunctive relief pursuant to 42 U.S.C. § 1983.

Plaintiffs were all inmates serving definite sentences of more than 90 days at Rikers Island.[3] In its unreported decision of July 30, 1976, the district court granted plaintiffs' motion to proceed as a class pursuant to F.R.C.P. 23(b)(2), which was unopposed; the class consists of all inmates on Rikers Island who are or will become eligible for conditional release.[4]

The operation of the conditional release program was described at trial. Raymond Dorsey, the official supervising the Rikers Island conditional release program, testified that he and his staff attempt to explain the program to all eligible inmates within the first week of their arrival. Parole officers then interview those who wish to apply. There are no written guidelines on how these interviews are to be conducted. There are no established practices determining the order in which arriving applicants are to be interviewed;[5] rather, the district court found that the

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3 The named plaintiffs have all been released from custody. See discussion in text, infra.

4 The district court record shows that on October 26, 1976 the district court granted plaintiffs-appellees' post-trial motion to amend the definition of the class to include inmates serviced by the Rikers Island parole staff who are transferred from Rikers Island to participate in certain programs in other parts of New York City. This amendment, which increases the size of the class by approximately 100 to 200 inmates, apparently went unopposed; accordingly, this court's opinion should be taken to refer to the class as amended.

5 The district court found the operation of the program to be "chaotic." For example, witness Maitland Jones testified that he was sentenced to a one year term on April 18, 1975 and arrived at Rikers Island on April 23. Jones stated that although he had applied for conditional release shortly after his arrival, he had not yet received an interview as of the date of his testimony, December 22, 1975. Appellees Zurak,

interviews are conducted on a random basis without regard to the amount of jail time served.[6] During the interview the parole officer asks the inmate certain questions and takes down any information the inmate wishes to provide; the inmate is also advised that letters in his behalf or job offers may be sent to the parole officer to be included in the inmate's file.

Based on the interview and the inmate's file the parole officer prepares a written report, which is placed in the inmate's file. The report includes a personal and social history of the inmate based upon the interview and information contained in available presentence reports. The parole officer makes no independent investigation and although he sometimes makes a recommendation, the conditional release decision is ordinarily left entirely to the discretion of a Board commissioner. The district court found that under existing conditions, it customarily takes 60 to 90 days for parole officers to submit their reports to the Board.

The commissioner's decision is based entirely on the information contained in the inmate's file, including the parole officer's report and the presentence report; the com-

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Zambuto and Mack testified that a period of three to four months passed before they learned their applications had been denied. Appellee Santiago testified that although he arrived at Rikers Island on June 30, 1975, after repeated efforts to contact a parole officer he was unable to obtain an interview until November 16; as of December 22, 1975 Santiago, who was serving a one year term, had yet to hear from the Board. Appellee Halpern testified that he arrived at Rikers Island on April 30, 1975 and immediately applied for conditional release. Halpern stated that he was not interviewed until the end of August. Halpern's release was deferred until November and granted December 1, 1975; however, Halpern stated that he refused conditional release because he had only 75 days left in his term and he preferred to serve this time rather than face a year-long probation.

6 New York Penal Law § 70.40(2) provides that jail time is to be treated as time served in computing the 60 day period. See notes 1 and 2, supra.

missioner neither interviews the inmate nor consults with the parole officer who conducted the interview. Inmates are not allowed to see their files. There are no written criteria upon which the commissioners base their decisions, although the testimony at trial indicated that they are primarily influenced by the applicant's prior record, the nature of his offense, the applicant's institutional adjustment and his future plans.[7] In September, 1975 the Board began to provide written statements of reasons and facts to inmates whose applications had been denied; prior to that time the Board's practice was merely to deny or defer an application without any statement. An inmate whose application has been denied may apply to the chairman of the Board for reconsideration.[8]

Before proceeding to the merits, we treat an initial issue regarding this court's jurisdiction. At oral argument appellants pointed out that by some time after the evidentiary hearing but prior to the district court's certification of the class in its order of July 30, 1976, all of the named plaintiffs had been released; accordingly, appellants now contend

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7 In *Haymes* v. *Regan*, 525 F2d 540 (2d Cir. 1975), we held that, at least where meaningful statements of reasons and facts are provided, it is not necessary for the Board to promulgate and disclose formal rules regarding release criteria for parole. It appears that under New York law, application for parole and conditional release are evaluated under the same standards. See New York Correction Law §§ 213, 827; New York Penal Law § 70.40(2). See also *United States ex rel. Johnson* v. *Chairman, N.Y. State Board of Parole*, 500 F.2d 925, 930 n.4 (2d Cir.), vacated and remanded as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015 (1974).

8 Lawrence Kavanaugh, Assistant Director of Field Operations of the Department of Corrections, indicated in his testimony that the Board's statements of reasons and facts (given since September, 1975) are prepared in accordance with New York Corrections Law § 214. He also stated that an inmate whose application has been denied may apply to the Chairman of the Parole Board for reconsideration and may indicate in a letter the reasons the original denial should be reconsidered. However, the record is silent on whether this opportunity for reconsideration is made generally known to the inmates.

that the controversy is moot. We reject this contention. Although a litigant must ordinarily be a member of the class that he seeks to represent at the time the class is certified, see *Sosna* v. *Iowa*, 419 U.S. 393, 402-03 (1975), this case is a "suitable exception" to that requirement. *Gerstein* v. *Pugh*, 420 U.S. 103, 110-11 n.11 (1975), *Sosna* v. *Iowa*, supra, 419 U.S. at 402 n.11. Because of the relatively short periods of incarceration involved and the possibility of conditionnl release there was a significant possibility that any single named plaintiff would be released prior to certification, although this possibility was less substantial than it was in *Gerstein*. As in *Gerstein*, however, the constant existence of a class of persons suffering the alleged deprivation is certain and the court may safely assume that counsel has other clients with a continuing live interest in the issues (appellees are represented by the Parole Revocation Defense Unit of the Legal Aid Society). See *Gerstein* v. *Pugh*, supra, 420 U.S. at 110-11n.11; *Frost* v. *Weinberger*, 515 F.2d 57, 62-65 (2d Cir. 1975); *McGill* v. *Parsons*, 532 F.2d 484, 488-89 (5th Cir. 1976); *Inmates of San Diego County Jail in Cell Block 3B* v. *Duffy*, 528 F.2d 954, 956-57 (9th Cir. 1975). Further, despite the admonition of F.R.C.P. 23(c)(1) that the court shall make the class action determination "[a]s soon as practicable after the commencement of an action," for reasons which are not apparent, almost a year elapsed between appellees' uncontested motion for class action status and the district court's certification. Appellants make no contention on appeal that the certification was improper nor is there any question that the class was properly identified by the district court. See *Indianapolis School Comm'rs* v. *Jacobs*, 420 U.S. 128 (1975) (per curiam). It follows that this case is not moot because the controversy as to the named plaintiffs has been resolved. Because of the relatively short periods of incarceration

involved and the possibility of conditional release, the alleged harm can hardly be redressed while any possible plaintiff is still an inmate. See *Gerstein* v. *Pugh*, supra, 420 U.S. at 110 n.11; *Sosna* v. *Iowa*, supra, 419 U.S. at 401-02. Furthermore, it is clear that there is a sufficient adversary relationship here to assure proper presentation of the issues. *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 752-57 (1976).

Turning to the merits, we must first inquire whether a prisoner's interest in conditional release is sufficient to warrant due process protection. Although the Supreme Court has rejected the notion that every state action having adverse consequences for an inmate automatically raises a question of due process, see, e.g., *Meachum* v. *Fano*, 44 U.S.L.W. 5053 (U.S. June 25, 1976); *Moody* v. *Daggett*, 45 U.S.L.W. 4017, 4020 n.9 (U.S. Nov. 15, 1976), it has left open the issue of whether, and to what extent, parole release procedures may be held to activate due process rights. See, e.g., *Moody* v. *Daggett*, supra, 45 U.S.L.W. at 4020; *Scott* v. *Kentucky Parole Board*, 45 U.S.L.W. 4009 (U.S. Nov. 2, 1976). As the district court noted, however, it is settled in this circuit that a prisoner's interest in prospective parole or "conditional entitlement" is entitled to due process protection: "Whether the immediate issue be release or revocation the stakes are the same: conditional freedom versus incarceration." *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, 500 F.2d 925, 928 (2d Cir.), vacated and remanded as moot sub nom. *Regan* v. *Johnson*, 419 U.S. 1015 (1974). See *Wolff* v. *McDonnell*, 418 U.S. 539 (1974); *Holup* v. *Gates*, —— F.2d ——, slip op. at 5881 (2d Cir. Oct. 20, 1976); *Haymes* v. *Regan*, 525 F.2d 540 (2d Cir. 1975).[9]

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9 As noted by Justice Stevens in his dissent in *Scott* v. *Kentucky Parole Board*, supra, the circuits are in conflict on this issue. See 45 U.S.L.W.

New York Penal Law §70.40(2) provides inmates a "justifiable expectation rooted in state law," *Montanye* v. *Haymes*, 44 U.S.L.W. 5051, 5052 (U.S. June 25, 1976), that they will be conditionally released if they meet Board standards. See New York Correction Law §827. Although the potential deprivation involved in an administrative decision is an appropriate factor to consider in determining the amount of process due, see *Mathews* v. *Eldridge*, 424 U.S. 319, 335, 341 (1976), it is the *nature* of the interest sought to be protected from official action that determines whether due process attaches. See *Meachum* v. *Fano*, supra, 44 U.S.L.W. at 5056. Whether labelled "conditional release" or "parole" the nature of the interest at stake in this case is the same: conditional freedom versus incarceration. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, supra, 500 F.2d at 928; cf. *Wolff* v. *McDonnell*, supra, 418 U.S. at 556-57.

Having determined that due process attaches, the question remains of how much process is due. In this inquiry we are guided by the Supreme Court's observation that identification of the specific dictates of due process generally requires consideration of three factors: 1) the private interest involved; 2) the risk of an erroneous deprivation of that interest through the procedures used, and the probable value of additional or substitute procedural safeguards; and 3) the public interest in maintaining existing procedures, including the function involved and the fiscal and administrative burdens entailed in additional or substitute procedures. See *Mathews* v. *Eldridge*, supra, 424 U.S. at 334-35.[10]

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at 4011 n.1, and cases cited therein; *Mower* v. *Britton*, 504 F.2d 396, 397 (10th Cir. 1975) (dictum).

10 In *Haymes* v. *Regan*, supra, 525 F.2d at 543, this court adopted an almost identical three-pronged balance between "the inmate's interest in

Turning first to the inmate's liberty interest we note that this court and others have distinguished between the inmate's interest in continued conditional freedom (involved in the parole revocation decision) and his anticipation or hope of freedom (involved in the parole release decision), see *Morrissey* v. *Brewer*, 408 U.S. 471, 482 n.8 (1972); *Gates* v. *Holup*, supra, slip op. at 5885; *Childs* v. *United States Board of Parole*, 511 F.2d 1270, 1286 (D.C. Cir. 1974) (Tamm, *J.*, concurring); in the latter instance the broad discretion afforded the Board necessarily lessens the required content of due process. See *Haymes* v. *Regan*, supra, 525 F.2d at 543.[11] We think a similar distinction can be drawn between the inmate's interest in conditional release and parole. As the state points out, applications for conditional release are less likely to be granted than are applications for parole; accordingly, the conditional release applicant's expectation of liberty is less justified and his interest is correspondingly less substantial. See *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, supra, 500 F.2d at 928.[12] Further, because

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the proceedings . . . the 'need for and usefulness of the particular safeguard in given circumstances' . . . (and) any direct burden which might be imposed on the Board" by this requirement, quoting *Frost* v. *Weinberger*, supra, 515 F.2d at 66, quoted in *Holup* v. *Gates*, supra, slip op. at 5886.

11 In *Childs* v. *United States Board of Parole*, supra, 511 F.2d at 1282, in a related context the court stated:

> "There is a substantial difference on the due process issue between a finding of serious disciplinary action leading to loss of good-time credits, involved in Wolff, and denial of an application for parole. The broad discretion of the Board in the latter instance lessens the content of required due process . . ."

12 In *Johnson* the court relied, in part, upon 1972 Board statistics showing that 75.4% (4,412) of the inmates applying for parole were successful; these statistics strengthened the court's conclusion that the inmates had a cognizable liberty interest in parole. Board statistics for 1974, however, reveal that only 29% (746) of the applicants seeking conditional release were successful.

the conditional release applicant's sentence will almost always be shorter than that of the parole applicant, he will ordinarily have less at stake.[13] Thus, although the inmate seeking conditional release has a significant interest in the Board's decision, we think his interest less substantial than that involved in parole revocation and, perhaps, release. Accordingly, although we reject the state's contention that these considerations negate the existence of an interest sufficient to warrant due process protection, we adopt the position that the demands of due process should be less stringent. Compare *Mathews* v. *Eldridge*, supra, 424 U.S. at 341-43.

The district court found the administration of the conditional release program to be chaotic. Obviously, the program is almost meaningless to an inmate if he is unable to obtain even a preliminary interview after six months at Rikers Island,[14] and such administration amounts to an arbitrary denial of the statutory entitlement. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, supra, 424 U.S. at 333, quoting *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965); see *Moody* v. *Daggett*, supra, 45 U.S.L.W. at 4020-22 (Stevens,

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13 See notes 1, 2 and 3, and accompanying text, supra. Appellees point out that the consequences of denial of conditional release to an inmate serving the maximum definite sentence (2 years, release possible after 60 days) and the consequences of denial of parole to an inmate serving the minimum indeterminate sentence (3 years, release possible after 1 year) almost overlap (22 months versus 24 months additional incarceration). However, since the court has only been given hypotheticals, and not facts, it can only presume what seems obvious: that the great majority of cases will not fall at the extremes presented in appellees' hypotheticals and thus in the majority of cases the consequences of an adverse decision of the Board will be far greater for the parole applicant than for the applicant for conditional release.

14 See note 5, supra.

*J.*, dissenting.[15] Since the testimony at trial indicates that applications are currently processed within 60-90 days of arrival at Rikers Island, the district court's order requiring that applications for conditional release be processed in order of eligibility and within 60-90 days of an inmate's arrival imposes little, if any additional administrative or fiscal burden. However, although we agree in principle with the district court's order, as a practical matter it may be impossible for the state authorities to process applications in strict order of eligibility and still maintain a fair and rational conditional release program.[16] Thus,

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15 The district court also correctly noted that the state legislature must have intended reasonably prompt action on conditional release applications.

16 In order to clarify some confusion evident at oral argument we note that by "eligibility" the district court obviously meant statutory eligibility. An inmate becomes "eligible" for release if he is serving one or more definite sentences with an aggregate term of at least 90 days and has served 60 days, including jail time as provided by statute. See notes 1 and 2, supra. It should be obvious that an inmate who may become eligible for conditional release and has served 20 days should ordinarily have his application processed before that of an inmate who has served only 10 days. Similarly, inmates who arrive with jail time should ordinarily be processed before inmates who arrive without such time; in any event, the staff has up to 90 days from the point at which an inmate arrives at Rikers Island within which to process his application (assuming the inmate falls within § 70.40(2) and desires to participate). While we appreciate Judge Van Graafeiland's concern with excessive involvement of the federal courts in state prison administration, any attempt to remedy unconstitutional action on the part of state prison officials must necessarily involve some "interference with the routine operation of a state penal system." We merely hold that the district court properly exercised its traditionally broad equitable discretion in shaping an order to eliminate the arbitrariness inherent in a system where applications are processed "at random." See *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Although problems may yet arise in the application of the conditional release program (such as how to treat tardy applications), the state authorities are in the best position to deal with such problems as they come up. This court simply cannot predict all the difficulties yet to be encountered and shape its order accordingly; to do so would unnecessarily strait jacket the state authorities.

for example, in processing applications the state authorities may wish to take into account the fact that an application has been filed in a tardy fashion. Because we view the court's order as an effort to deal with the exigencies at hand and not an attempt unnecessarily to tie the hands of the state authorities, we understand the court's mandate to require the processing of applications in strict order of eligibility only to the extent that this is practical and fair to the applicants. The state authorities thus remain free to fashion their own procedures to deal with administrative problems that may arise in the application of the program as long as applications are processed in a timely and rational fashion.

We have no difficulty with the district court's requirement of a statement of reasons and facts. The fundamental nature of such statements in parole release decisions is discussed by Judge Mansfield in *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole,* supra, and was noted again in *Haymes* v. *Regan,* supra, 525 F.2d at 543-44, and *Holup* v. *Gates,* supra, slip op. at 5886-87. It is sufficient here to note that the same considerations apply to conditional release decisions and to emphasize that, particularly where an administrative body is vested with such large discretion, a requirement of a statement of reasons and facts is necessary to protect against arbitrary and capricious decisions or actions grounded upon impermissible or erroneous considerations. See *United States ex rel. Johnson* v. *Chairman, New York State Parole Board,* supra, 500 F.2d at 929. Such statements must provide the inmate with the grounds for a decision to deny or defer his application for conditional release, and the essential facts upon which the Board relied. See *Haymes* v. *Regan,* supra, 525 F.2d at 544. As the Board alleges that it has been voluntarily complying

with this requirement since September, 1975, the court's order should constitute no additional burden.[17]

Given the foregoing procedural safeguards, and keeping in mind the interest at stake and the additional administrative and fiscal burdens involved, we conclude that a personal hearing before a member of the Board is not constitutionally mandated. Unlike a parole revocation proceeding, the procedures used in the conditional release program are not adversary in nature; rather, both the Board and the inmate have an interest in obtaining the inmate's release. See *Gagnon* v. *Scarpelli*, 411 U.S. 778, 784-85 (1973); *Hyser* v. *Reed*, 318 F.2d 225, 237, 242 (D.C. Cir. 1963) (en banc), cert. denied, sub nom. *Thompson* v. *United States Board of Parole*, 375 U.S. 957 (1963). Unlike parole revocation, the conditional release decision will rarely, if ever, involve complex factual disputes in which the inmate may have to prove himself innocent of criminal behavior or show factors in mitigation. See *Morrissey* v. *Brewer*, supra, 408 U.S. at 488; *Gagnon* v. *Scarpelli*, supra, 411 U.S. at 786-88; *Carson* v. *Taylor*, —— F.2d ——, slip op. at 5075, 5085 (2d Cir. July 22, 1976). Nor will conditional release decisions involve questions of serious violations of discipline in maximum security institutions as in *Wolff* v. *McDonnell*, supra, 418 U.S. at 558-63. Under the district court's order, applications for conditional release

17 Of course, voluntary compliance does not make a controversy moot where, as here, there is a possibility of recurrence of the wrongful conduct. *Allee* v. *Medrano*, 416 U.S. 802, 810-11 (1974); *United States* v. *W.T. Grant Co.*, 345 U.S. 629, 632-33 (1953). We also reject appellants' suggestion that this portion of the court's holding was unnecessary because New York Correction Law § 214(6) provides for written statements of reasons and facts. Section 214 by its terms applies only to parole decisions. Moreover, we fail to see how appellants can rely on that part of section 214(6) which requires written statements and then ignore the language in the same section indicating that such statements are to be preceded by a hearing before a three-member panel of the Board—a procedure reserved for parole decisions.

must be processed within 90 days of an inmate's arrival at Rikers Island. The Board's decision is primarily influenced by the applicant's prior record, the nature of his offense, his institutional adjustment, and his future plans. Thus, given the short span of time between arrival at Rikers Island and the release decision and the fact that the parole officers make no independent investigations, the information upon which the Board acts must necessarily be obtained in large part from available presentence reports and the inmate interviews. Under New York Criminal Procedure Law § 390.50 defendants are given access to their presentence reports prior to sentencing and thus have an opportunity to learn of and correct any inaccuracies. Appellees do not claim that there is any motive for, or evidence of, fabrication in the parole officers' relation of the inmate interviews. Compare *Carson* v. *Taylor*, supra, slip op. at 5085. Thus, the risk of the Board basing its decision on erroneous information is relatively minimal and the record simply does not support allegations that misinformed decisions have been prevalent in the past. Compare *Holup* v. *Gates*, supra, slip op. at 5887. The requirement of a statement of reasons and facts should serve to protect the inmate from arbitrary decisions, or those based on impermissible grounds, see *Haymes* v. *Regan*, supra, 525 F.2d at 544; *United States ex rel. Johnson* v. *Chairman, New York State Board of Parole*, supra, 500 F.2d at 929; further, if a decision has no basis in an inmate's file, judicial review should be available. *Holup* v. *Gates*, supra, slip op. at 5888.

Although a personal interview might provide the inmate with a better opportunity to present his case to the Board, we think that, under all the circumstances, the inmate has sufficient opportunity to present the relevant facts through the parole officer and by his own submission of any information helpful to his cause.

We cannot ignore the significant additional financial and administrative burdens necessarily involved in providing in-person hearings to all conditional release applicants. In 1974 there were some 2578 applications for conditional release by inmates at 62 local penitentiaries and jails throughout the state; 1200 of these applications were made by inmates at Rikers Island. The Board, which currently consists of 11 members, conducts about 15,000 hearings per year in panels of three. Even if the impact of a decision of this court requiring conditional release hearings could be limited to the class of inmates at Rikers Island, "[w]e only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial." *Matthews* v. *Eldridge*, supra, 424 U.S. at 347. Weighing all of these factors, we conclude that due process does not require that a personal appearance before a member of the Board be given to each conditional release applicant.

Finally, we find no merit in appellees' claim that the difference in procedures between inmates seeking conditional release and inmates seeking parole violates the Equal Protection Clause. See New York Correction Law §214. Equal protection does not require that all procedural protections be applied in the same fashion without regard to the length of internment or the nature of the crime involved. See, e.g., *Marshall* v. *United States*, 414 U.S. 417, 422 (1974); *McGinnis* v. *Royster*, 410 U.S. 263, 269-70 (1973); *Baldwin* v. *New York*, 399 U.S. 66 (1970). Compare *Baxstrom* v. *Herold*, 383 U.S. 107, 110-11 (1966).

Accordingly, we affirm the order of the court except as it requires appellants to provide a personal appearance before a member of the Board to applicants for conditional release.

VAN GRAAFEILAND, *Circuit Judge*, concurring in part and dissenting in part:

I concur in that portion of the majority opinion which holds that appellees are not entitled to appear personally before the Parole Board.

Since August 1975, the State has been furnishing rejected applicants for conditional release with written statements of the reasons for their rejection. For this reason, and because this Court has already spoken on this issue in the related field of parole, *see, e.g., United States ex rel. Johnson* v. *Chairman of New York State Board of Parole*, 500 F.2d 925 (2d Cir.), *vacated and remanded as moot sub nom. Regan* v. *Johnson*, 419 U.S. 1015 (1974), I also concur with the majority that such statements should be furnished.

As to the balance of the order appealed from, I would reverse. It requires the State to institute appropriate procedures to "insure" that conditional release applications be processed in order of eligibility and mandates that they be processed within 60-90 days of the arrival of an inmate on Rikers Island. In thus holding that the State may not process one prisoner's application until after it has processed the application of another who will become eligible for release one day earlier, the District Judge has elevated the petty to constitutional status. Ignoring the admonition of the Supreme Court that "federal courts do not sit to supervise state prisons, the administration of which is of acute interest to the States", *Meachum* v. *Fano*, 44 U.S.L.W. 5053, 5057 (U.S. June 25, 1976), he has created another procedural morass for already beleaguered prison officials and created inequities in the process.

If constitutionality is to be equated with fairness, an unjustifiable equation under the law, *see Meachum* v. *Fano*, *supra*, at 5056, fairness to all should be the criterion. A

plan is not fair which requires a prisoner, who makes prompt application for release, to sit patiently by until after the application of a less diligent inmate, albeit one with earlier eligibility, is passed upon by the Commission. A procedure is not just which mandates that an application, which is complete and untroublesome, gather dust on the shelf until information is compiled to complete the file of a more controversial applicant. Such Federal interference with the routine operation of a state penal system is not compelled by the Fourteenth Amendment which, we should occasionally remind ourselves, provides simply that no State shall "deprive any person of life, liberty, or property, without due process of law. . . ."

My colleagues, recognizing the inequities in the District Judge's order, construe it as if it did not contain the word "insure". They say that the procedures which the State is ordered to adopt must require the processing of applications in strict order of eligibility "only to the extent that this is practical and fair to the applicants." I submit that this constitutes not an affirmance but a reframing of the District Judge's order and, with all due respect to my colleagues, merely substitutes one unfortunate consequence of unnecessary federal interference for another. It is one thing to direct the State to promulgate rules which require processing in order of eligibility only to the extent that it is "practical and fair"; it is quite another thing to promulgate them. If it is possible for the State to draft rules which will withstand the challenge of indefiniteness, what a Pandora's box they will open for the litigious prisoner who asserts their impractical or unfair application. This infelicitous result, we mandate in the name of Due Process.

My brothers say that, because applications are presently being processed within 60-90 days, the order which re-

quires that this be done imposes little, if any, additional administrative or fiscal burden on the State. Of course, this is not the proper test to be applied in determining whether a Federal Court order should issue. The question, simply put, is whether the Constitution forbids the lapse of 91 days in the processing of applications. In his dissenting opinion in *Moody* v. *Daggett*, 45 U.S.L.W. at 4020-22, which my brothers cite with apparent approval, Justice Stevens, speaking with regard to parole revocation hearings, said at 4022 n.12:

> I should also make clear that I would not prescribe any inflexible rule that the hearing must always take place within a fixed period.

There is no such inflexible rule in the Constitution. reasonable dispatch, this right cannot accrue until his ap- have his application for conditional release processed with

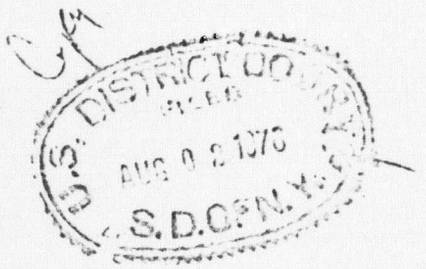
Assuming that a prisoner has a constitutional right to plication is made. The order, which requires that processing be completed within 60-90 days after the inmate's arrival on Rikers Island, completely ignores this fact. The order may well operate to benefit the tardy and troublesome inmate at the expense of his more diligent and deserving brother by requiring overworked parole officers to lay the latter's easily processed application aside while they meet the court-imposed deadline for the tardy troublemaker.

Our eagerness to correct asserted wrongs should not blind us to the fact that when we create a right, we also lay the groundwork for a remedy. One would expect that a right of such constitutional magnitude as to justify delineation by this Court would merit drastic remedial relief. Contempt of court, habeas corpus and actions for damages are remedies which come readily to mind. Woe betide the hapless penal officer who violates an inmate's constitutional

rights by processing his application out of order or by failing to process it within the prescribed ninety days. I have in the past expressed my concern about excessive involvement by the federal courts in the operation of state penal institutions. *See McRedmond* v. *Wilson*, 533 F.2d 757, 766 (2d Cir. 1976) (Van Graafeiland, *J.*, dissenting). Those portions of the order which I would reverse illustrate well the basis for my concern.

# APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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GUSTAVE ZURAK, WILLIAM MC AULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,

Plaintiffs,

- against -

PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDE, FRANK CROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,

Defendants.

75 Civ. 4018

4404

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CARTER, District Judge

# O P I N I O N

## I

New York Penal Law Section 70.40(2), applicable only to individuals serving definite sentences, provides:

New York Penal Law Section 70.40(2)

"2. Definite sentence. A person who is serving one or more than one definite sentence of imprisonment with a term or aggregate term in excess of ninety days may, if he so requests, be conditionally released from the institution in which he is confined at any time after service of sixty days of that term, exclusive of credits allowed under subdivisions four and six of section 70.30. In computing service of sixty days, the credit allowed for jail time under subdivision three of section 70.30 shall be calculated as time served. Conditional release from such institution shall be in the discretion of the parole board, and shall be upon such conditions as may be imposed by that board in accordance with the provisions of the correction law.

"Conditional release shall interrupt service of the sentence or sentences and the remaining portion of the term or aggregate term shall be held in abeyance. Every person so released shall be under the supervision of the parole board for a period of one year. Compliance with the conditions of release during the period of supervision shall satisfy the portion of the term or aggregate term that has been held in abeyance."

Under New York Law definite sentences are those that do not exceed one year. The maximum penalty for a crime classified as a misdemeanor is a term of imprisonment of one year or less, New York Penal Law §70.15, and persons guilty of Class D & E felonies may be sentenced to terms of imprisonment of one year or less, Id. §70.00 (4). These are definite sentences. Those of more than one year's imprisonment are indeterminate under New York Law, with a minimum of three years' imprisonment and a maximum of life imprisonment, and may be imposed only for crimes classified as felonies. Id. §70.00. A definite sentence is served in a county or regional correctional institution, while an indeterminate sentence must be served at a state prison. Id., §70.20.

The instant action attacks the constitutionality of the New York Penal Law as applied and seeks a preliminary injunction granting plaintiffs and the class they represent the right to appear in person before the Parole Board ("Board") in connection with the Board's consideration of their conditional release applications; mandating expedited consideration of such applications in conformity with the statutory eligibility date; requiring the Board to provide written reasons for their determinations

denying conditional release, and requiring that the Board indicate in writing the information relied upon in reaching their conclusions.

Plaintiffs are all inmates serving definite sentences of more than 90 days in the New York City Correctional Institution For Men on Rikers Island and who are now or will be eligible for conditional release pursuant to New York Penal Law §70.40 (2), and New York Correction Law §827. They seek class action determination which is unopposed.

At the hearing on the matter, Gustave Zurak, Benjamin Santiago, Salvatore Zambuto, Maitland Jones, Willie Mack and Martin Halpern--plaintiffs or witnesses for the plaintiffs--testified. Their testimony with respect to conditional release procedures at Rikers Island was generally to the same effect and may be summarized as follows. Shortly after arrival on Rikers Island, the witnesses were advised of the conditional release program, filed an application for release under the program, and were interviewed by a parole officer. The witnesses had not been given the opportunity to see what was in their files, and after the interview heard nothing further for a long time.

Zurak was notified in March, 1975, some four months after he filed his application that it had been denied. No reasons were given. Halpern applied in May,, 1975, and in September was notified that his application had been deferred until November. On December 1, 1975, Halpern was offered conditional release but turned it down since his incarceration would end in any event before February, 1976. Santiago applied for conditional release early in June, 1975, was not interviewed until November, 1975, and as of the time of the hearing had heard nothing further. Zambuto applied for conditional release in April, 1975, and was notified in July, 1975 that his release had been denied. Jones had been at Rikers Island since May, 1975, but was not assigned to the New York City Correctional Institution For Men until June. He immediately applied for release, but some six months later had not yet been called for an interview with the parole officer.

The plaintiffs' version of events was verified in substantial part by the state's witnesses. Raymond E. Dorsey, Supervising Officer on Rikers Island has responsibility for administering the conditional release program. He and his staff endeavor to have the conditional release program explained to all potential eligibles, i.e., to

inmates serving 91 days or more, within the first week of their arrival at the institution. The eligible inmates are asked if they wish to make application for conditional release, and a record of those who wish to apply and those who do not is kept. Thereafter, a parole officer interviews the willing applicants. He takes down all information the inmates wish to provide, and based on what he is told during the interview, and on information in the inmate's file, a report is prepared and presented to the parole board "as soon as possible." The report of the parole officer includes a personal or social history of the inmate based on information gleaned from the inmate or contained in the probation report. Thus, the report includes information relative to the inmate's residence on release, job prospects, the inmate's sentence, offense, the amount of jail time served, and the date his sentence is to terminate, a summary of his prior record, and the officer's evaluation. The parole officer does no independent investigation and "makes no strong recommendation for or against." It is left pretty well up to the Commissioner to make a decision." (Tr.169). These reports, along with the inmates' files, are brought to the main parole board office in New York City each Friday. It should be noted that since September, 1975, each denied or deferred

application is accompanied by a written statement of reasons for the denial or deferral.

In 1974, 1,200 applicants sought conditional release. There are no memoranda or other written guidelines outlining how interviews are to be conducted. Nor are there any practices or regulations establishing the order in which arriving applicants are to be interviewed. It is done on a random basis without regard to amount of jail time served prior to sentence, and without regard to the date an inmate's sentence is to terminate. The interviewing officer does not show the contents of the inmate's file to the applicant. The Parole Commissioners acting on the applications do not make their decision pursuant to any written guidelines or criteria. It is all "an individual decision." Officer Dorsey testified that the Commissioners take into account the applicants' prior record, the nature of the instant offense, institutional adjustment and future plans and are primarily influenced by these factors in making their determinations. The Commissioners do not see the inmate and do not consult with the parole officer who interviewed the applicant and who filed a report on his application. Dorsey testified that it was impossible for his staff to process conditional release

applications so that they could be submitted to the Parole Board within the 60-day period of eligibility prescribed by the statute, since the backlog of applications was too great. His estimate was that the parole officers submitted their reports to the Parole Board between 60-90 days--or 30 days after the statute provides that conditional release may be granted.

II

Class Action Determination

Plaintiffs seek to pursue this action on their own behalf and on behalf of all others similarly situated. The putative class consists of all inmates incarcerated at the New York City Correctional Institution for Men on Rikers Island who are eligible or will be eligible for conditional release. The testimony indicates that the number of eligible inmates on Rikers Island who apply each year for conditional release is approximately 1,200. That number (and the class of eligible applicants designated by plaintiffs necessarily exceeds that 1,200 figure) clearly meets the test of numerosity under Rule 23(a)(1), F.R.Civ.P. See, e.g., Robertson v. National Basketball Ass'n, 389 F. Supp. 867 (S.D.N.Y. 1975); Davis v. Avco Corp., 371 F. Supp. 782 (N.D. Ohio 1974). Moreover, there is a factual nexus linking all

members of the putative class, and the impact of the implementation of §70.20(2) on them as the statute's intended beneficiaries is the same. Thus, the test of common questions of law and fact is met. F.R.Civ.P., Rule 23(a)(2). See, e.g., United States ex rel. Walker v. Mancusi, 338 F. Supp. 311, 315-16 (W.D. N.Y. 1971), aff'd on other grounds, 467 F. 2d 51 (2d Cir. 1972). The claims being asserted--the haphazard and chaotic administration of the conditional release program on Rikers Island, the absence of written guidelines as criteria for those with authority to grant or deny conditional release, denial of the right to a personal appearance before the Commissioner--meet the test of typicality, F.R.Civ.P., Rule 23(a)(3). See, e.g., Kohn v. Royall, Koegel & Wells, 59 F.R.D. 515, 521 (S.D.N.Y. 1973), appeal dismissed, 496 F. 2d 1094 (2d Cir. 1974). Finally, the class is fairly and adequately represented by plaintiffs and their counsel.

Accordingly, this action is maintainable as a Rule 23(b)(2) class action on behalf of all inmates at the New York City Correctional Institution for Men on Rikers Island who are now or will be eligible for conditional release pursuant to New York Penal Law §70.20(2).

III

It is settled in this circuit that a"prisoner's interest in prospective parole or 'conditional entitlement'"must be accorded due process protection. "Whether the immediate issue be release or revocation, the stakes are the same: conditional freedom versus incarceration." United States ex rel. Johnson v. Chairman of New York State Board of Parole, 500 F. 2d 925, 928 (2d Cir.), vacated and remanded sub nom. Regan v. Johnson, 419 U.S. 1015 (1974). The statutory grant is clear and is stated in unambiguous language entitling those inmates serving definite sentences of more than 90 days to apply for conditional release which may be granted at the discretion of the Parole Board and subject to such conditions as the Parole Board imposes. New York Penal Law, §70.40(2).

The state makes two arguments. First, it alleges that the "substantial interest" in the grant of parole found to exist in Johnson is not present with regard to the conditional release applicant. Parole Board statistics for 1972 on which the finding of a substantial interest was found to exist in Johnson showed that 75.4% of the inmates coming before the Board were granted parole. The 1974 statistics, however, revealed that of 2,578 conditional release applicants, only 746, or less than

29%, were granted release. Accordingly, the state argues that these statistics hardly give rise to any substantial expectation of release.

The state further argues that plaintiffs' due process rights must be viewed as minimal at best, since their incarceration must necessarily terminate within one year. Thus, defendants contend, while those serving indeterminate sentences of three years or more, who are eligible for parole, are granted a hearing before the Parole Board, plaintiffs' minimal due process entitlement is adequately met under present procedures.

At the hearing, Joseph J. Salo, Executive Secretary to the New York State Parole Board stated that parole hearings are explicitly required by state law and no hearing is held on conditional release applications because there is no statutory requirement that these applicants be granted a hearing. In colloquy with the court, Mr. Salo admitted that he could see no difference for such disparate treatment other than the strict requirement of the statute as to why a hearing should be held for those eligible for parole and not held for those eligible for conditional release. He added that "the only difference is that in '74 I don't know whether there were 25 or 26 hundred applicants for

conditional release [s]pread out over 62 counties" (Tr. 136), and that the members of the Parole Board could not travel over the whole state.

The evidence at the hearing demonstrates that present administration of the conditional release program on Rikers Island is chaotic. The applications are not processed in any order designed to insure submission to the Parole Board in at least a rough approximation to the dates of eligibility (that is, those with earlier eligibility dates being submitted to the Board before those with subsequent eligibility dates). The testimony also made clear that the parole staff deemed it impossible to get the applications processed and before the Board within 60 days of the inmate's incarceration. The statute requires only that the application be considered "at any time after service of sixty days." New York Penal Law §70.40(2). I do not read the statute as necessitating that the conditional release application be given Parole Board consideration on the 60th or 61st day, but only that procedures be instituted which will result in such consideration within a reasonable time after the 60th day when the inmate becomes eligible for conditional release. Since the term to be served is a maximum of one year, the legislature must have intended and contemplated reasonably

prompt action on these applications by the parole staff and by the Parole Board. Raymond Dorsey who is in charge of the conditional release program at Rikers Island testified that he needed 60-90 days to process applications. Due process is not an inflexible concept. See Morrissey v. Brewer, 408 U.S. 471 (1972). Provided procedures are adopted which will insure that applications are processed in order of eligibility, the 60-90 day period for processing the applications seems adequate, but any delay beyond 90 days appears to be unreasonable.

The conditional release procedures currently being employed, however, do seem clearly to violate basic due process requirements. Until only recently, the Parole Board's practice was to deny applications without giving reasons for such denials. Since September, 1976, new procedures have been instituted and the inmate is given, in a written statement from the Commissioner who reviewed his application, the reasons for denial of his release application. At the hearing, it was merely indicated that written reasons now accompany the denial of each application. Insofar as the current procedure requires the Commissioner to include in each application which is denied a specific and meaningful statement of reasons and the facts underlying the denial, due process requirements have been

met. Haymes v. Regan, 525 F. 2d 540, 544 (2d Cir. 1975).[1]

That brings us to the only remaining issue--whether applicants for conditional release must be accorded a hearing before the official who decides on such applications. Here the state has, pursuant to §70.20(2) of the New York Penal Law, extended an expectation of liberty, if sought, to those inmates serving definite sentences. Due process unquestionably requires that fair procedures be utilized to determine whether that expectation is to be realized. Franklin v. Shields, 399 F. Supp. 309, 316 (W.D. Va. 1975). The testimony adduced at the hearing demonstrated unequivocally that the conditional release applicant is not receiving fair treatment under present procedures. He is interviewed by a parole officer, but because of staff constraints, the parole officer conducts no independent investigation, instead relying on what the inmate tells him and what information is in the file from the probation authorities. He makes a report which is submitted to the Parole Board; yet, the parole officer is never consulted by the Commissioner and, indeed, since he does not know the inmate-applicant, the Commissioner could not seem to be helped by the parole officer's presence.

The inmates are not given access to their conditional release files, which in itself seems to be a denial of due process. See, e.g., United States ex rel. Carson v. Taylor, ____ F. 2d _____, Civil No. 1029 (2d Cir., July 22, 1976), holding, inter alia, that due process requires that a parolee be afforded access to documents that will be introduced against him at a revocation hearing, unless the Parole Board meets the burden of establishing good cause for their nondisclosure. The lack of such access seems to have led to injustice involving one of the named plaintiffs who had another inmate's records included in his file. The Parole Commissioner is too burdened to be expected on his own to notice such errors (and apparently in this case he did not). The parole officer assumes no responsibility for presenting the inmate's case. As Mr. Dorsey stated, the parole officer's report is neutral and everything is left pretty much up to the Commissioner. Fundamental fairness cannot be achieved under present procedures for processing conditional release applications unless the inmate-applicant is given the opportunity to appear in person before the Board and to discuss his case with the Commissioner.

The state has resisted the right to a personal appearance on applications for conditional release, arguing that the cost of such hearings would be prohibitive, and the demand on the Commissioner's time unduly burdensome given the present size of the Board, the number of conditional release applications processed annually, and the already severe constraints on Board members' time by virtue of their other duties. It is clear, however, that neither financial nor administrative difficulties suffice to excuse the state from according basic due process rights to inmates. See, e.g., Detainees of Brooklyn House of Detention v. Malcolm, 520 F. 2d 392, 399 (2d Cir. 1975); Rhem v. Malcolm, 507 F. 2d 333, 341 n.20 (2d Cir. 1974).

The trend towards requiring that basic due process safeguards be accorded in parole revocation and grant proceedings is to protect inmates from bureaucratic arbitrariness and caprice, and from actions grounded upon impermissible considerations. See, Haymes v. Regan, supra, 525 F. 2d at 544; United States ex rel. Johnson v. Chairman of New York State Board of Parole, supra, 500 F. 2d at 929; see also, Cardaropoli v. Norton, 523 F. 2d 990, 998-9 (2d Cir. 1975); Parole Release Decisionmaking and the Sentencing Process, 84 Yale L.J. 810 (1975). Moreover, unless we are resigned to

accept recidivism as a universal fact of incarceration, the public interest is furthered by adopting orderly and fair procedures for dealing with a prisoner's expectation of liberty.

The state's contention that a 29% ratio of success for conditional release applicants as demonstrated by 1974 statistics, as against 75% for parole applicants, as found in the Johnson case, supra, does not give rise to an expectation warranting due process protection. It is the New York Penal Law §70.40(2) that posits in the inmate serving a definite sentence, an expectation of freedom after sixty days of incarceration, and that expectation cannot be quantified as warranting or not warranting due process protection based upon fulfillment percentiles pursuant to Parole Board action. Thus, the conclusion in Johnson that procedures for the grant of release from incarceration as well as revocation of release must be clothed with some degree of due process is applicable to conditional release applicants as well as parole applicants.

Accordingly, with respect to plaintiffs' claims for injunctive relief, it is hereby ordered that:

(1) Defendants institute appropriate procedures to insure that conditional release applications be processed in order of eligibility. Applications are to be processed within 60-90 days of the arrival of an inmate on Rikers Island;

(2) The Board is to provide to each inmate whose application for conditional release is denied or deferred, a written statement of the reasons for such denial or deferral, together with a written statement of the facts relied on in reaching the decision.

(3) Applicants for conditional release are to be accorded the right to a personal appearance before the Commissioner or Commissioners responsible for deciding on the disposition of his application.

SO ORDERED.

Dated: New York, New York
July 30, 1976

Robert L. Carter

ROBERT L. CARTER
U.S.D.J.

FOOTNOTE

1/

It should be noted that §214 of the New York Correction Law was recently amended by the addition of subdivision six to require the Parole Board to inform each prisoner denied parole of "the facts and reason or reasons for such denial."

# APPENDIX C

UNITED STATES DISTRICT COURT
CHAMBERS OF
JUDGE ROBERT L. CARTER
UNITED STATES COURTHOUSE
FOLEY SQUARE
NEW YORK, N. Y. 10007

November 21, 1975

Natalie J. Kaplan, Esq.
The Legal Aid Society
Parole Revocation Defense Unit
15 Park Row
New York, New York 10038

Stanley L. Kantor, Esq
Assistant Attorney General
Two World Trade Center
New York, New York 10047

Re: Gustave Zurak, William McAuliffe, etc. v. Paul J. Regan, et al.
75 Civ. 4018

Dear Ms. Kaplan and Mr. Kantor:

I am writing to advise you that an evidentiary hearing will be required in the above-captioned matter.

It is my understanding that a written statement of reasons for the denial of conditional release is now being provided to all unsuccessful applicants, pursuant to § 214(6) of the Correction Law, as amended. It is also my understanding from the papers submitted by the state (See Defendant's Supplemental Memorandum of Law, at 17) that the newly amended Corrections Law (as interpreted by the State) provides for a written statement of evidence relied upon by the Parole Board to be furnished to those applicants for conditional release whose applications have been denied.

I also understand that pursuant to §70.40(2) of the Penal Law, persons serving definite sentences in excess of ninety days are entitled to conditional release after service of sixty days of that term.

With this in mind, the issues to be explored at the hearing will include the following:

1. Evidence regarding the implementation of the §214(6) requirement that the Parole Board provide a statement of reasons for the denial of conditional release.

2. Evidence regarding the implementation of the requirement that the Parole Board furnish to unsuccessful applicants a statement of evidence relied on.

3. Evidence on why the Parole Board is apparently unable to make conditional release decisions before, or close to, the date of eligibility.

4. Evidentiary proof of the feasibility of, and the burdens attendant upon, granting conditional release applicants the right to a personal appearance before the Parole Board prior to a decision.

5. Evidence and/or argument relating to plaintiffs' motion for class action status, the validity of plaintiffs' class defintion, and the mechanics of class notice.

I would appreciate it if you would inform me as soon as possible of the approximate time it will take you to present evidence on these issues at the hearing. When I have received your estimates I will be able to set this matter down for a definite date.

Very truly yours,

Robert L. Carter

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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|---|---|
| GUSTAVE ZURAK, WILLIAM McAULIFFE, SALVATORE ZAMBUTO, WILLIE MACK, BENJAMIN SANTIAGO, MARTIN HALPERN, on behalf of themselves and all others similarly situated,<br><br>Plaintiffs-Appellees,<br><br>-against-<br><br>PAUL J. REGAN, BENJAMIN WARD, RAYMOND DORSEY, WILLIAM BARNWELL, FRANK CALDWELL, MAURICE DEAN, MARTIN GILBRIDGE, FRANK GROSS, ADA JONES, MILTON LEWIS, JOHN MAFFUCCI, LOUIS PIERRO, JOHN QUINN, and ANGEL LUIS RIVERA, Commissioner of New York State Board of Parole, individually and in their official capacities,<br><br>Defendants-Appellants. | 76-2100<br><br>AFFIDAVIT OF SERVICE |

STATE OF NEW YORK )
) ss.:
COUNTY OF NEW YORK )

GORDON J. JOHNSON, being duly sworn, deposes and says that on February 22, 1977, I served a copy of the within Petition For Rehearing by mailing via United States mail, postage pre-paid, a true and correct copy of same to the attorney for Defendants-Appellants, Louis J. Lefkowitz, Attorney General (Arlene Silverman, of Counsel), 2 World Trade Center, New York, New York 10047.

GORDON J. JOHNSON
Attorney for Plaintiffs-Appellants
The Legal Aid Society
Parole Revocation Defense Unit
15 Park Row - 19th Floor
New York, New York 10038
(212) 577-3500

Sworn to before me this
22nd day of February, 1977

LISA N. BUTMAN
Notary Public, State of New York
Qualified in Kings County
Commission Expires March 30, 1977

Notary Public

Lisa N. Butman